Supreme
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APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

O.T. 1971

NO. 70-92

CALIFORNIA MOTOR TRANSPORT CO., et al., *Petitioners,*

vs.

TRUCKING UNLIMITED, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed March 2, 1971
Certiorari Granted June 1, 1971

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

APPENDIX

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United States

October Term, 1970

No. 1419

California Motor Transport Co., et al., *Petitioners,*

vs.

Trucking Unlimited, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed March 2, 1971
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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

February 20, 1967— Plaintiffs' first amended complaint filed in U.S. District Court for the Northern District of California.

April 17, 1967 — Motions filed by defendants to dismiss, because of failure to state a claim upon which relief can be granted, and because of applicability of doctrine of primary jurisdiction.

October 6, 1967 — Memorandum of Decision of Federal District Judge Sweigert dated October 5, 1967, dismissing complaint for failure to state an antitrust violation.

November 1, 1967— Letter of October 25, 1967 from Federal District Judge Sweigert to Mr. Khourie, stating that the October 6, 1967 Memorandum of Decision did not extend to consideration of motion to dismiss on ground of primary jurisdiction.

October 5, 1970 — Opinion and judgment of the Court of Appeals for the Ninth Circuit.

October 5, 1970 — Letter of October 5, 1970 from Clerk of the Court of Appeals for the Ninth Circuit advising of entry of judgment on that day reversing and remanding the judgment of the court below.

December 22, 1970— Order of Mr. Justice Blackmun extending time to file petition for writ of certiorari to February 18, 1971.

February 9, 1971 — Order of Mr. Justice Douglas extending time to file petition for writ of certiorari to March 4, 1971.

United States District Court
For the Northern District of California

Civil Action No. 45073

Trucking Unlimited, a corporation, Don D'Onofrio, an individual, dba Donofrio Drayage-Record Express, B. C. Lawson Drayage, Inc., a corporation, Cargo Carriers, Inc., a corporation, Meek Trucking Company, a corporation, L.D.S. Truck Lines, a corporation, G. A. Hutchinson & Son Draying, a corporation, Frank L. Nolan, Jr., an individual formerly a co-partner of Frank Nolan Drayage Co., American Transfer Co., a corporation, Coast Drayage, a corporation, Ruddway Drayage Company, a corporation, Rose J. Antonini, Virgil J. Antonini, Administrator of the Estate of Louis E. Antonini, and Virgil J. Antonini, a partnership, dba Antonini Fruit Express, Johansen's Superior Truck Line, Inc., a corporation, Pozas Bros. Trucking Co., a corporation, Plaintiffs,

vs.

California Motor Transport Co., a corporation, Delta Lines, Inc., a corporation, Di Salvo Trucking Co., a corporation, Oregon Nevada California Fast Freight, Inc., a corporation, Southern California Freight Lines, Ltd., a corporation, Pacific Intermountain Express Co., a corporation, Pacific Motor Trucking Company, a corporation, Ringsby Truck Lines, a corporation, Shippers Express Company, a corporation, Sterling Transit Company, Inc., a corporation, Valley Motor Lines, Inc., a corporation, T.I.M.E. Freight, Inc., a corporation, Walkup's Merchants Express, a corporation, Willig Freight Lines, a corporation, Garden City Transportation Co., Ltd., a corporation, California Cartage Company, Inc., a corporation, Boulevard Transportation Company, a corporation, Callison Truck Lines, Inc., a corporation, Ringsby-Pacific Truck Lines, a corporation (formerly Fortier Transportation Company), Defendants.

FIRST AMENDED COMPLAINT

(Jury Demanded)

Cause of Action of Plaintiff

B. C. LAWSON DRAYAGE, INC.

Plaintiff complains of defendants as follows:

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted, against defendants under Title 15, Section 15 and 26 U.S.C., being a part of the antitrust laws of the United States, commonly known as the Clayton Act, for violations of the Sherman Act and the Clayton Act. The purpose of this action is to obtain injunctive relief and to recover damages, as provided by law, for injuries to plaintiff's business and property within the period allowed by law, which injuries proximately resulted from defendants' violations of the antitrust laws of the United States.

2. The unlawful acts and violations of law herein described have been conceived, carried out, made effective and performed in major part within the above district and division and have affected areas elsewhere in California and in other states.

Parties

3. Plaintiff is a corporation organized and existing under the laws of the State of California.

4. Plaintiff was at all times herein mentioned a highway carrier operating pursuant to a certificate or permit duly issued by the California Public Utilities Commission (P.U.C.) and pursuant to the authority of the Interstate Commerce Commission (I.C.C.). As a highway carrier, plaintiff was at all times herein mentioned in the business

of transporting goods and packages throughout areas of California and of rendering to customers other services incidental to the actual transportation of such goods and packages.

5. The defendants are all corporations, each organized and existing under the laws of one of the states of the United States. Each defendant is found and transacts business within the above district and elsewhere in California and in some cases in other states. Each is engaged in the business of transporting goods and packages throughout areas of California and to and from other states and of rendering to customers other services incidental to the actual transportation of goods and packages.

Interstate Commerce

6. The violations herein alleged have occurred within the stream of interstate commerce and substantially, directly and adversely affect interstate commerce. All defendants are interstate instrumentalities who have improperly used their power over interstate commerce so as to adversely affect, restrict and impinge upon local commerce.

The Functions of the Regulatory Agencies as Involved in This Complaint

7. The grants of operating rights, consents to transfer rights or registrations of rights sought by plaintiff and other competitors of defendants and the filing of complaints by defendants against their competitors, as set forth in the following section entitled "The Violations", were initiated by the filing of formal applications, peti-

tions or complaints with the California P.U.C. or I.C.C. Protests or oppositions to such filings were likewise initiated by similar formal writings. The proceedings or machinery by which such applications, petitions or complaints were adjudicated were judicial in nature. Such proceedings generally involved formal filings, service of process, formal notice as regulated by statute or regulation, discovery, including the taking of depositions, issuance of subpoenas and subpoenas duces tecum in accordance with identical procedures used in the Superior Courts of California, the taking of oral or written testimony under oath, findings, conclusions, decisions and opinions, the use of precedent in the decisional processes and the making of a record of proceedings and testimony. Plaintiff and other competitors of defendants who are joined herein or who are members of the designated class do not complain of any activities of defendants or their co-conspirators toward or in reference to any function of the I.C.C. or P.U.C. except as such activities pertain to the precise proceedings before such bodies here described.

The Violations

8. On information and belief, plaintiff alleges that defendants have combined, contracted and conspired to restrain trade and commerce, have monopolized, attempted to monopolize and conspired to monopolize trade and commerce in the transportation of goods and packages in the above district and elsewhere, all in violation of Sections 1 and 2 of the Sherman Act. The violations of the Sherman Act constitute the behavior of defendants as follows:

A. Beginning in or about February 1961, and continuously thereafter, defendants and their co-conspirators, constituting the largest common carriers in the State of California and the Western United States, formed and entered into a conspiracy for the agreed aim and purpose of putting their competitors, including plaintiff, out of business, of weakening such competitors, of destroying, eliminating and weakening existing and potential competition, and of monopolizing the highway common carriage business in California and elsewhere.

B. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants have combined and committed their financial and other resources and utilized such resources to engage in the activities set forth herein.

C. In order to accomplish the purposes of the conspiracy, the defendants have agreed jointly to carry out a consistent, systematic, and uninterrupted program of instituting judicial proceedings or actions in the California Public Utilities Commission, the Interstate Commerce Commission, the Supreme Court of California, the United States District Courts, the United States Courts of Appeal, and the United States Supreme Court in opposition to, with but a few and insignificant exceptions, every request, application or action for operating rights, transfers of rights, of registrations of rights made or brought by plaintiff and other competitors of defendants before such agencies and courts. The conspiracy included the agree-

ment to seek rehearings or take appeals to and through the various levels of the courts if such proceedings were lost by defendants and their co-conspirators or to oppose rehearings or appeals taken by plaintiff and other competitors if plaintiff and other competitors lost any such proceedings. Defendants and their co-conspirators agreed to resist and oppose at all levels. The conspiracy included the agreement to jointly finance all opposition which, if such opposition were not so financed, would not have been made at all because of the great expense involved in such a program of protests.

D. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants have instituted protest or opposition proceedings against plaintiff's and other competitors of defendants' applications or requests for rights, transfers of rights, and registrations of rights in the P.U.C. and I.C.C., and have filed complaint proceedings against plaintiff and other competitors of defendants in the P.U.C. Upon losing such proceedings, the defendants have filed for or sought rehearings, reviews or appeals of such decisions below, and accordingly have instituted proceedings for rehearing, review or appeal in the agencies and courts set forth herein. Upon prevailing against plaintiff and other competitors of defendants in the P.U.C. or I.C.C., the defendants have effected a joint program of resisting rehearings, reviews or appeals on the part of plaintiff and other com-

petitors of defendants in the agencies and courts set forth herein.

E. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, defendants have as a matter of policy instituted the proceedings and actions set forth herein with or without probable cause, and regardless of the merits of the cases of plaintiff and other competitors of defendants, or of the defendants' opposition.

F. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants have established a trust fund to finance their conspiracy, and each defendant has contributed finances to the fund in monthly payments in amounts proportionate to each defendant's yearly gross income, regardless of whether such contributing defendant participated in or had a competitive interest in the proceedings instituted by and on behalf of the defendants' conspiracy as set forth herein.

G. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants have publicized and made known to defendants' competitors, including plaintiff,

(1) That the defendants' conspiracy, with its combination of financial wealth and resources, would be used to oppose, with but a few and insignificant exceptions, all applications, requests, or actions pending on behalf of plaintiff and other competitors of defendants at the time the conspiracy com-

menced, or to be made or brought by plaintiff or other competitors of defendants at all times thereafter;

(2) That such opposition proceedings would be instituted and pursued by defendants through the judicial machinery of the agencies and courts as set forth herein; and

(3) That it would be expeditious and wise for plaintiff and other competitors of defendants to terminate, abandon or surrender existing applications, requests or actions, and to limit severely or refrain entirely from making or bringing further applications, requests or actions for rights, transfers or registrations in the agencies and courts set forth herein, lest plaintiff or such other competitors of defendants be met with the combined wealth and resources of defendants.

H. Pursuant to conspiracy, the defendants have deliberately and purposefully achieved the agreed upon aims, as follows:

(1) The defendants have depleted the resources of plaintiff and other competitors of defendants who, even where granted the rights, transfers or registrations requested, have expended the wherewithal and resources required to remain in business or to compete successfully in resisting or overcoming the defendants' conspiracy.

(2) The defendants have delayed the ultimate granting of rights, transfers or registrations

sought by plaintiff and other competitors of defendants so as to damage severely their ability to compete or remain in business even though all or part of the rights, transfers and registrations were ultimately granted.

(3) The defendants have successfully discouraged and deterred plaintiff and other competitors of defendants from initiating or pursuing requests, applications or actions for rights, transfers or registrations.

(4) The defendants have practically and actually made unavailable to plaintiff and other competitors of defendants free and unlimited access to the judicial machinery of the agencies and courts as set forth herein.

(5) The defendants have clogged and impeded the judicial machinery of the agencies and courts set forth herein, thereby denying plaintiff and other competitors of defendants free and unlimited access thereto.

(6) The defendants have harassed and obstructed plaintiff and other competitors of defendants.

(7) The defendants have harassed and obstructed the judicial machinery of the agencies and courts set forth herein.

(8) The defendants have abused the judicial machinery of the agencies and courts set forth herein.

(9) The defendants have denied to the agencies and courts the benefit of facts and informa-

tion, competently presented through established judicial procedures, upon which such agencies and courts make their decisions.

(10) The defendants, acting in concert, became capable of instituting opposition proceedings as set forth herein and have thereby defeated or restricted, in whole or in part, rights, transfers and registrations requested or applied for by plaintiff and other competitors of defendants on the basis of decisions rendered on the merits of the issues presented. Such decisions which, but for the defendants' combination and conspiracy, would not have been rendered adverse to plaintiff and other competitors of defendants, because no opposition would otherwise have been commenced.

I. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants, being possessed of monopoly power by reason of the combination of their wealth and resources, have in fact performed and done the acts, and have employed the means alleged herein.

Effect of Violations

9. By virtue of the violations of the antitrust laws on the part of defendants, competition of plaintiff and other competitors of defendants has been restrained, lessened, impaired and eliminated. The judicial machinery of the P.U.C. and I.C.C. and the courts has been effectively closed to plaintiff and other competitors of defendants.

Defendants have succeeded in defeating, delaying or restricting rights sought by plaintiff and other competitors of defendants, regardless of the merits, in situations where no protest would have been made at all except for the unlawful combination and purpose of the conspiracy and combined strength of the defendants. The defendants have, in effect, become the regulators of the grants of rights, transfers and registrations to plaintiff and other competitors of defendants rather than the P.U.C., the I.C.C. and the courts. The value of the businesses of the plaintiff and other competitors of defendants has diminished because of difficulty encountered in transferring rights to willing purchasers. As a result of the foregoing, the defendants have acquired, implemented, fostered and aggrandized their economic and monopoly power.

Damages

10. As a direct and proximate result of the violations set forth herein, the value of plaintiff's business and property has been substantially injured, its profits seriously impaired, plaintiff has been required to make extensive expenditures as a result of defendants' actions, and it has suffered a loss of value, goodwill and reputation to its business, all in an amount presently unknown to plaintiff.

Second Cause of Action of Plaintiff
B. C. LAWSON DRAYAGE, INC.

1. Plaintiff repleads the First Cause of Action with the exception of subparagraph 8A.

2. Prior to 1961, pursuant to prior decisions rendered by the P.U.C., grants of operating rights to common carriers were liberally given. Applications by truckers for

such rights were granted as a matter of course, with some of them encountering no opposition whatsoever and the remaining encountering only sporadic opposition. Also prior to 1961, defendants and other co-conspirators took full advantage of the above-described P.U.C. decisions, and to the extent that they desired them, applied for and received extensive operating rights. Also prior to 1961, applications by truckers for the transfer of rights were freely granted, with most of them encountering no opposition whatsoever, and the remaining few encountering only sporadic opposition. Beginning in 1963, the I.C.C., upon granting of applications of truckers, permitted P.U.C. operating rights to be registered as part of the interstate authority of applying truckers.

3. Beginning in or about February 1961 and continuously and uninterruptedly through the dates of the filing of the complaint and this first amended complaint, defendants and their co-conspirators combined for the agreed aims and purposes of (a) denying plaintiff and other competitors of defendants the business advantage otherwise available to them by virtue of the policy of the P.U.C.; (b) denying plaintiff and other competitors of defendants the business advantage of having their applications for rights, transfers and registrations heard and granted without enervating, ceaseless and financially debilitating opposition; (c) thwarting the policy and aims of the P.U.C. in liberally granting operating rights; (d) depriving plaintiff and other competitors of defendants of valuable operating rights by rendering such rights difficult and expensive to transfer to a buyer or register with the I.C.C.; and (e) themselves becoming,

in effect, the regulators, rather than the P.U.C., the I.C.C. and the courts, of the granting of operating rights, transfers and registrations by plaintiff and other competitors of defendants.

Causes of Action of Plaintiff
CARGO CARRIERS, INC.

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is the assignee of all of the right, title and interest in the claims here asserted of B.B.S. Transportation Co., Inc.

Causes of Action of Plaintiff
L.D.S. TRUCK LINES

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
JOHANSEN'S SUPERIOR TRUCK LINE, INC.

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
POZAS BROS. TRUCKING CO.

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
TRUCKING UNLIMITED

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
G. A. HUTCHINSON & SON DRAYING

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is the assignee of all of the right, title and interest in the claims here asserted of G. A. Hutchinson dba G. A. Hutchinson & Son Draying.

Causes of Action of Plaintiff
DON D'ONOFRIO,
dba DONOFRIO DRAYAGE-RECORD EXPRESS

1. Plaintiff repleads the entire First Cause of Action with the exception of Paragraph 3 and the Second Cause of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is an individual doing business as Donofrio Drayage-Record Express.

Causes of Action of Plaintiff
FRANK L. NOLAN, JR.

1. Plaintiff repleads the entire First Cause of Action with the exception of Paragraph 3 and the Second Cause of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is an individual, formerly a copartner of Frank Nolan Drayage Co.

Causes of Action of Plaintiff
COAST DRAYAGE

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
AMERICAN TRANSFER CO.

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
RUDDWAY DRAYAGE COMPANY

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
MEEK TRUCKING COMPANY

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is the assignee of all of the right, title and interest in the claims here asserted of W. H. Meek, Jr. dba McDermott Trucking Co.

Causes of Action of Plaintiff
ROSE J. ANTONINI, VIRGIL J. ANTONINI
and VIRGIL J. ANTONINI, Administrator

1. Plaintiff repleads the entire First Cause of Action with the exception of Paragraph 3 and the Second Cause of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiffs Rose J. Antonini, Virgil J. Antonini and Virgil J. Antonini, Administrator, are in partnership doing business as Antonini Fruit Express.

Class Action

Plaintiffs complain of defendants as follows:

1. All plaintiffs above named, acting on their own behalf and on behalf of all competitors of defendants, as hereinafter defined, similarly situated, as a class, bring this cause of action pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure for treble the amount of damages suffered by them and each member of the class as a direct result of the defendants' violations of the antitrust laws of the United States and for injunctive relief.

2. Plaintiffs are informed and believe that within the State of California there are in excess of one hundred highway carriers who have been damaged by the defendants as described herein. Such carriers are:

A. Those carriers who have been harassed and financially depleted, weakened and damaged by the conduct of defendants alleged herein;

B. Those carriers who have been harassed and financially depleted, weakened and damaged and who

have been restricted in, limited in, or precluded from extending their operating rights and capabilities by the conduct of the defendants alleged herein;

C. Those carriers who have been harassed and financially depleted, weakened and damaged and who have purchased or sold, or attempted to purchase or sell, existing carrier rights but who have been limited in, restricted from or precluded from consummating such purchases or sales because of the conduct of defendants alleged herein. The named plaintiffs and all of the above-described carriers are a class of persons herein called "competitors of defendants."

3. Because of the large number of competitors of defendants and the expense and burden to the parties and to the Court in litigating their claims separately, it is impractical to bring them all individually before the Court at this time.

4. The nature of the offenses charged and the commerce involved present substantial questions of law and fact common to the named plaintiffs and all other competitors of defendants, and the named plaintiffs fairly insure adequate representation of the interests of the entire class of competitors of defendants.

5. The named plaintiffs and the competitors of defendants, and each of them, hereby replead the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Prayer

WHEREFORE, the plaintiffs pray:

A. That the conduct of the defendants as herein alleged be adjudged and decreed to be in violation of the antitrust laws;

B. That judgment be entered against the defendants for treble the amount of damages suffered by each named plaintiff as a result of the violations of the antitrust laws alleged herein as required by Section 4 of the Clayton Act (15 U.S.C. 15).

C. That each member of the class represented by plaintiffs who has been injured by the violations of the antitrust laws alleged herein be allowed to intervene in this action either before or after trial for the purpose of proving the amount of damages suffered by it, and that judgment be entered against defendants for treble the amount of damages so proved.

D. That plaintiffs be awarded their costs of suit, including reasonable attorneys' fees, as required by Section 4 of the Clayton Act.

E. That plaintiffs have such other and further relief as the Court shall deem just and proper.

F. That the Court issue an injunction against defendants as is herein requested, and such orders as are appropriate.

A jury trial is hereby demanded.

Dated: February 16, 1967.

Broad, Busterud & Khourie,
By Michael N. Khourie,
Attorneys for Plaintiffs.

United States District Court
For the Northern District of California

No. 45073

Trucking Unlimited, et al.,
Plaintiffs,
vs.
California Motor Transport Co., et al.,
Defendants.

(1) MOTION TO DISMISS FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED:

(2) MOTION TO DISMISS FIRST AMENDED COMPLAINT ON GROUND OF PRIMARY JURISDICTION, OR TO STAY PENDING ADMINISTRATIVE ACTION

(1) Motion to dismiss First Amended Complaint for failure to state a claim upon which relief can be granted

Come now the above-named defendants, and move the Court to dismiss the First Amended Complaint for failure to state a claim upon which relief can be granted inasmuch as all the actions complained of fall within defendants' protected right to petition governmental authorities.

Wherefore, defendants move the Court to dismiss the First Amended Complaint.

(2) Motion to dismiss First Amended Complaint on ground of primary jurisdiction, or to stay pending administrative action

Come now the above-named defendants, and move to dismiss the First Amended Complaint on the ground that the allegations therein fall within the exclusive primary jurisdiction of the Public Utilities Commission of the State of California or the exclusive primary jurisdiction of the Interstate Commerce Commission.

In the alternative the above-named defendants move this Court to stay further proceedings pending a final decision of the Public Utilities Commission of the State of California (or should a court review of such Public Utilities Commission decision be taken, pending final decision of the court of last resort reviewing such decision) respecting those allegations falling within its exclusive primary jurisdiction, and pending a final decision of the Interstate Commerce Commission (or should a court of review of such Interstate Commerce Commission decision be taken, pending final decision of the court of last resort reviewing such decision) respecting those allegations falling within the exclusive primary jurisdiction of the Interstate Commerce Commission.

Wherefore, defendants move the Court to dismiss the First Amended Complaint or in the alternative to stay proceedings in this action.

The motions herein are supported by the attached memorandum.

Dated this 17th day of April, 1967, at San Francisco, California.

Graham, James & Rolph
Boris H. Lakusta
E. Myron Bull, Jr.
Roger D. MacKenzie

Heller, Ehrman, White & McAuliffee
John MacDonald Smith, Esq.
W. D. Bensen, Jr., Esq.
By /s/ Boris H. Lakusta
Boris H. Lakusta
Attorneys for Defendants

United States District Court
Northern District of California

No. 45073

Trucking Unlimited, et al.,
Plaintiffs,
vs.
California Motor Transport Co., et al.,
Defendants.

Sweigert, J.

MEMORANDUM OF DECISION

This is a civil antitrust class action for treble damages brought under Section 4 of the Clayton Act, 15 U.S.C. § 15, by fourteen plaintiffs, each engaged in transportation of goods by motor vehicle under regulation of the California Public Utilities Commission (PUC) and the Interstate Commerce Commission (ICC), charging nineteen individually named defendants, similarly engaged and regulated, with violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

The case is before the Court on defendants' motion under Rule 12(b) (6) Fed. R. Civ. P., to dismiss the First Amended Complaint for "failure to state a claim upon which relief can be granted."

The record consists of the Complaint, the First Amended Complaint and the pending motion. No facts beyond the pleading are presented by either party through

affidavit or otherwise except as may be hereafter specifically noted.

The First Amended Complaint alleges in substance and effect (See: First Amended Complaint, par. 8, A-I, pp. 6-13) that ever since February, 1961, defendants have conspired to put plaintiffs and their other competitors out of business and for that purpose have combined their financial and other resources to carry out a consistent, systematic and uninterrupted program of instituting through the procedural machinery of the California PUC, the ICC and of the courts, opposition to every request or application (mainly applications for certification under the public convenience and necessity provisions of the California Public Utilities Act, §§ 1061-1073) made by plaintiffs or by other competitors of defendants before such agency, and to appeal any rulings of those agencies to the courts, all "without probable cause" and "regardless of the merits of the cases the plaintiffs and defendants' other competitors or of the merits of defendants' opposition."

It is further alleged that defendants have contributed to a special trust fund for this purpose according to their respective yearly gross incomes and regardless of whether a contributor has a competitive interest in any particular request or application made by plaintiffs or other competitors; that without such an agreement to jointly finance such oppositions, such oppositions would not be made at all because of the great expense involved in such a program of protests; that, upon prevailing against plaintiffs and other competitors, defendants engage in a joint program of also resisting rehearings, reviews or

appeals sought by plaintiffs or other competitors; that defendants have made known to plaintiffs and other competitors their intended program of combined and well-financed opposition in order to induce plaintiffs and their other competitors to abandon existing applications or requests and to refrain from making further applications or requests; that defendants have thus depleted the resources of plaintiffs and other competitors expended in resisting or overcoming the defendants' conspiracy of opposition; that defendants have thereby deprived the agencies and courts of the benefit of facts and information, and that defendants have defeated applications and requests of plaintiffs and other competitors on the basis of decisions which, but for defendants' combination, would not have been rendered adversely to plaintiffs and other competitors because, absent such conspiracy of opposition, no opposition would have been made.

Defendants contend that this First Amended Complaint should be dismissed upon the ground that under the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) the kind of activities alleged are immune from challenge under the antitrust laws.

We recognize, of course, that a complaint should not be dismissed under Rule 12(b) (6) Fed. R. Civ. P., for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Moore's Federal Prac.* Vol. 2A § 12.08.

Before considering the applicability of *Noerr* and *Pennington*, we point out that the First Amended Complaint

does not charge acts in restraint of trade or attempts at monopoly except in the one respect that defendants associated for the purpose of intervening in regulatory proceedings to oppose plaintiffs' applications.

There is no allegation that defendants have engaged in, or conspired to engage in, any other conduct designed to restrict the competition of plaintiffs or to monopolize the industry, e.g., rate control, restriction of service, boycott or blacklisting of plaintiffs or plaintiffs' customers or any similar conduct which might violate the antitrust laws.

Thus, plaintiffs' First Amended Complaint has been narrowly drawn to present the single question of whether defendants' association for intervention in regulatory proceedings before the PUC or the ICC—without any other alleged anti-competitive conduct—is rendered violative of the antitrust laws by reason of defendants' alleged anti-competitive purpose and intent.

As plaintiffs state in their brief, "The misuse of judicial process constitutes plaintiffs' entire factual and legal case, not an insignificant matter incidental to different facts and legal theories." (Plt. Brief filed 5/16/67; p. 42). Further, the First Amended Complaint states that "Plaintiffs, and other competitors of defendants who are joined herein or who are members of the designated class, do not complain of any activities of defendants or their conspirators toward, or in reference to, any function of the ICC or PUC *except* as such activities pertain to the precise proceedings before such bodies." (First Amended Complaint, Par. 7, p. 5).

Noerr, supra, was an action by a group of trucking companies under Section 4 of the Clayton Act for treble

damages and injunctive relief against a group of railroads alleging that the railroads had engaged a public relations firm to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business.

The trial court, disclaiming any purpose to hold illegal mere efforts on the part of the railroads to influence the passage of new legislation or the enforcement of existing law, rested its judgment against the railroads upon findings, first, that the railroads' publicity campaign, insofar as it was actually directed at lawmaking and law enforcement, was malicious in that its only purpose was to destroy the truckers as competitors and, further, was fraudulent in that it involved deceiving the lawmaking and law enforcement authorities by use of the so-called third party technique; and, secondly, that the railroads' campaign also had as an important, if not overriding purpose, the destruction of the truckers' good will among the general public and the truckers' customers, thus injuring the truckers in ways unrelated to the passage or enforcement of laws.

On appeal, the Supreme Court reversed the judgment. After stating the principle that "the Sherman Act does not prohibit two or more persons from associating together to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly", the Supreme Court held that none of the factors reflected in the trial court's findings were sufficient to remove the case from this controlling principle.

Specifically, the Supreme Court held that the fact, established by the trial court's finding, that "the railroads' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitiors for the long distance freight business", would not "transform conduct otherwise lawful into a violation of the Sherman Act." (365 U.S. 127, at pp. 138, 139).

The Supreme Court further concluded that the use by the railroads in their campaign to influence governmental action of the so-called third party technique, involving deceptive and unethical public relations propaganda, would not constitute a violation of the Sherman Act because the Act is directed at trade restraints, not against political activity designed to influence governmental action. (365 U.S. 127, at pp. 140, 141).

The Supreme Court further at p. 144, concluded that, assuming application of the Sherman Act might be justified in situations in which a publicity campaign, ostensibly directed toward influencing governmental action, would be a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor" such was not the case before it since no one denied that the railroads were making a genuine and apparently successful effort to influence legislation and law enforcement practices.

Pennington, supra, was an action by the United Mine Workers (U.M.W.) for royalty payments. The defendants, certain coal companies, filed a cross-claim for damages alleging that the U.M.W. and certain other large coal companies had violated Sections 1 and 2 of the Sherman Act by: (1) entering into a Wage Agreement,

which was later established under the Walsh-Healy Act by the Secretary of Labor, that provided a minimum wage for employees of contractors selling coal to the T.V.A., (2) imposing this Wage Agreement on all coal companies without regard to their ability to pay, and (3) waging a destructive and collusive price-cutting campaign in the T.V.A. "spot market" (which was exempt from the Walsh-Healy order) with the purpose of eliminating the smaller companies from the market.

After a jury trial, a verdict was returned in favor of the defendants on their antitrust cross-claim against the union. The trial court set aside the antitrust verdict against the plaintiffs, but denied a union motion for judgment notwithstanding the verdict or in the alternative for a new trial—a motion based on the ground that the union was exempt from liability under the facts of the case and also upon claimed trial court errors. The Court of Appeals affirmed denial of the union's motion, holding that the union was not exempt from liability under the Sherman Act and, further, that the instructions were adequate and that the evidence was sufficient to support the verdict.

The Supreme Court agreed that the agreement between the U.M.W. and the larger coal operators was not exempt from the antitrust laws under § 20 of the Clayton Act, and § 4 of the Norris-LaGuardia Act. However, the Supreme Court went on to hold that the trial court had erroneously denied the motion of the U.M.W. for a new trial on the ground that there had been errors in the admission of evidence and in instructions, stating on pages 669 and 670:

> "We agree with the U.M.W. that both the Court of Appeals and the trial court failed to take proper account of the *Noerr* case. In approving the instructions of the trial court with regard to the approaches of the union and the operators to the Secretary of Labor and to the TVA officials, the Court of Appeals considered *Noerr* as applying *only* to conduct 'unaccompanied by a purpose or intent to further a conspiracy to violate a statute.' * * * Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed and, giving the obviously telling nature of this evidence, we cannot hold this lapse to be mere harmless error."

The *Noerr* and *Pennington* cases establish the rule that violation of the Sherman Act cannot be predicated upon combined attempts to influence the passage of laws or attempts to influence public officials in the enforcement of laws even when the sole purpose and intent of the persons engaging in such activity is, and the result may be to destroy their competitors.

The reasons given by the Supreme Court for this rule are threefold: (1) That this type of combination is essentially dissimilar from the type of agreements traditionally condemned by the Sherman Act; (2) That holding this kind of activity subject to the sanctions of the Sherman Act would impair the power of government to act upon the basis of information provided to it by interested parties, and (3) That a construction of the Sherman Act, bringing this kind of activity within its purview,

would raise important constitutional questions, e.g., the right to petition.

Thus, the Supreme Court has in effect weighed these factors in balance with the factor of the antitrust intent or result of certain kinds of concerted activity and has concluded that the latter factor must be risked in order to subserve other governmental needs and political rights.

The *Noerr* doctrine has been recognized and applied in *United States v. Johns-Manville,* 259 F.Supp. 440 (E.D. Pa. 1966) (involving alleged combination for informal approaches to municipal authorities to obtain restrictive specifications for certain pipe with intent to injure competitors); *A.B.T. Sightseeing v. Gray Line,* 242 F.Supp. 365 (S.D.N.Y. 1965) (involving alleged combination to lobby lawmaking and administrative agencies of the City of New York with intent to ultimately eliminate competition); *Harmon v. Valley Natl. Bank,* 339 F.2d 564 (9th Cir. 1964) (involving alleged combination by defendants with the Attorney General of Arizona to commence a court action for the purpose of injuring a competitor); *Assn. of Western Ry. v. Riss,* 299 F.2d 133 (D.C. Cir. 1962) (involving an alleged combination of four Ry. Associations to influence legislative and administrative action with intent to destroy competition); and in *Baltimore & Ohio Ry. v. New York, N. H. & H. R. Co.,* 196 F.Supp. 724 (S.D.N.Y. 1961) (involving alleged combination to propagandize the ICC to impose certain rates on competitors together with the filing of a suit to obtain enforcement of the ICC rates).

In *Woods v. Aluminum Co.,* 36 F.R.D. 107 (S.D. Tex. 1963), the court refused to apply the *Noerr* doctrine on

a motion for summary judgment where the allegation was to the effect that defendants had conspired to file "false nominations" with the Texas Railroad Commission (whose regulatory Act provided that every oil producer should file monthly forecasts ("nominations") of the amount of gas that could be produced and sold from oil fields. In that case, however, the court, posing the question whether the conduct complained of was "political in nature" held that, if defendants were enjoined from conspiring to submit "false nominations" with the Railroad Commission, (there are no such charges in our pending case) they would not thereby be deprived of any constitutional right to petition or participate in the governmental process; that defendants would only be prohibited from undertaking "certain joint business behavior which would not remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr;* and, further, that, assuming plaintiff's activities were 'political' in nature, the complaint also tendered the issue (unlike the pending case) whether defendants had conspired *in other respects,* apart from the filing of false nominations, to restrain competition."

In *Harmon, supra,* a civil action brought under the antitrust laws, our Court of Appeals, reversing dismissal of the action on ground of failure to state a claim, considered an allegation to the effect that defendants had combined to induce the Attorney General of Arizona (alleged to have been a participant in the combination) to file a court suit under a state statute (authorizing the Attorney General to bring such action against building and loan associations in the event of certain irregularities

specified in the statute) which suit resulted in placing Arizona S & L Association in receivership and closing its business. In the course of the receivership plaintiffs' contractual rights, acquired in dealings with the Arizona S & L Association, had been disallowed by the state court receiver.

The court, discussing the applicability of *Noerr, supra,* (and also of *Pennington, supra,* and *Association of Western Railways v. Riss, supra)* agreed that *Noerr* would apply whether or not the proceeding brought by the Attorney General had substantive merit and, that defendants' conduct (informing the Attorney General of alleged irregularities and persuading him to take the action) "would be essentially political in nature" and immune from attack for the reasons set forth in *Noerr.*

The court held, however, that the complaint in that particular case (unlike the First Amended Complaint here) could be read as alleging defendants' joint effort to influence the Attorney General "was but one element in a larger, long continued scheme to restrain and monopolize" the financial industry, pointing out that there was nothing in the complaint which would preclude proof that the alleged conspiracy was aimed, in part, directly at the refinancing arrangements between plaintiff and the Arizona S & L Association.

In *Washington Brewers v. United States,* 137 F.2d 964, (9th Cir. 1943) a criminal prosecution against the defendants, Brewers Institute and others, for violation of the Sherman Act §§ 1 and 3, the court, although affirming the trial court's refusal to dismiss the indictment (alleging concerted fixing of prices) on demurrer, pointed out that,

insofar as the indictment charged defendants with conspiring to influence the formulation of state policy concerning liquor and with combining to police the enforcement of state laws, it charged no antitrust offense saying: "We know of no reason why brewers, like other people, may not jointly advocate state legislation thought by them to be desirable, nor why they may not single or in concert, aid the authorities *in the policing of any legislation which it is within the competency of states to adopt.*" (emphasis added).

Plaintiffs first contend that the doctrine of *Noerr* and *Pennington, supra,* is applicable only to activities directed to the legislative branch of government for the enactment of laws or to the executive branch for the enforcement of laws and that the doctrine is not applicable to activities conducted through the procedural machinery of the courts or of regulatory agencies like the California PUC or the ICC in which certain quasi judicial functions are vested.

Although it is true that in *Noerr* and *Pennington,* the court was speaking in terms of the "legislative" and "executive" branches of government there involved, this Court is of the opinion that the rationale of the *Noerr-Pennington* doctrine is clearly and equally applicable to activities directed to the courts or to regulatory agencies for the purpose of taking positions on points of fact or law pertinent to the regulatory acts.

The gist of the *Noerr-Pennington* doctrine is that concerted activities "conducted along lines normally accepted in our political system" are not rendered violative of the antitrust laws even though the purpose or result may be to injure a competitor.

The right of access to courts and regulatory agencies is just as much a political right as the right of access to the legislative and executive branches. In fact, the Supreme Court has expressly recognized that the right of access to judicial agencies is within the protection of the First Amendment right of petition and has held that a statute impairing such right is, therefore, unconstitutional, *NAACP v. Button,* 371 U.S. 415 at 430 (1963).

Both the ICC and PUC Acts, involved in the pending case, are framed in such manner as to invite intervention by members of the regulated industry and other interested persons in opposition to applications for certificates of the kind here involved. The regulatory agencies often encourage such intervention in order to provide them with pertinent information concerning public convenience and necessity without which these applications would be in effect mere one-sided proceedings.

It seems clear that, under the rationale of *Noerr,* the mere fact of association by defendants for the purpose of resort to the regulatory agencies of the courts in order to oppose applications by others in the manner provided by law could not be held a violation of the antitrust law—even if the intent of defendants is, or the result might be, the injury of competitors.

The Noerr Doctrine

Plaintiffs next contend that defendants' purported access to and use of the procedures of the regulatory agencies and of the courts in the exercise of their rights is mere "sham" within the meaning of that term as used by the Supreme Court in *Noerr, supra.*

However, the First Amended Complaint does not allege that all or any of the oppositions mentioned in the pleading were filed or were to be filed without probable cause. The pleading carefully refrains from charging that the oppositions were false, misleading to the agency or lacking in factual allegation and legal theory arguably relevant to the function of the regulatory agency in determining public convenience and necessity. The allegation is merely that defendants combined to file them "with or without probable cause". This allegation falls far short of charging that the oppositions would not be upon probable cause. On the contrary, it implies that all or at least some of the oppositions may have been filed *with* probable cause.

Nor does the First Amended Complaint allege that all or any of the applications made by plaintiffs (which defendants oppose) were meritorious under the applicable regulatory acts. The allegation carefully refrains from alleging that they were. Plaintiffs merely allege that defendants combined to oppose their applications "regardless of the merits of" the applications. This falls short of alleging that the applications were meritorious. On the contrary, it implies that all or at least some might be without merit.

Plaintiffs, themselves, in their Brief filed 5/16/67, p. 8, present certain exhibits showing that 21 out of 40 matters which had reached the decision stage as of 11/28/61, resulted in action favorable to defendants either because the opposed application was denied by the agency in whole or in part or substantially reduced in scope or because the application was dismissed by the applicant after defendants appeared in opposition.

In the light of the pleading, considered either alone or in the light of such exhibit, and in a light most favorable to plaintiffs, it is impossible for this Court to say that the pleading supports plaintiffs' conclusionary claim of "sham" as that term was used in *Noerr*.

On the contrary, just as the findings in *Noerr* negatived the theory of sham, so also the allegations here negative that theory and show, as in *Noerr*, that, whatever the ultimate purpose and intent of defendants may have been, the oppositions were not, so far as the pleading is concerned, sham but were genuine and in part successful.

To hold that this complaint alleges an antitrust violation would be to hold in effect that defendants are liable in damages for having associated to present their oppositions to the agencies regardless of the merit of the oppositions or lack of merit in the applications opposed—solely because defendants, according to the complaint, entertained an ulterior motive of injuring or destroying defendants' competition.

Whatever the law would be without *Noerr*, the Supreme Court has resolved the problem of bad purpose or intent *vis a vis* freedom of resort to public officials and agencies by holding that the latter is to be subserved notwithstanding the risk of tolerating an anti-competition purpose of such resort and a possible anti-competitive result.

There is no good reason why regulated business firms may not freely submit their information and views on public convenience and necessity to the regulatory agency without subjecting themselves to antitrust attack upon the ground that their purpose was to restrict competition —an objective which may be easily implied because it is

inherently involved in the regulatory act, itself, which is designed to restrict entries into the industry to those justified by findings of public convenience and necessity. In our opinion, the rationale of *Noerr* is such that this result is not required.

As impliedly recognized in Noerr, the "probable cause" or "merit" of such applications or oppositions as are presented to the regulatory agency (or to the legislative or other executive officials) can be left to their responsible expertise (and appropriate judicial review) rather than be presented to the courts in the guise of an antitrust suit.

The gist of plaintiffs' complaints is that the resort of defendants to the regulatory agencies to oppose and thereby put plaintiffs to the proof in support of their applications has made it "exceedingly expensive" for plaintiffs and others to obtain certificates.

Unfortunately, proceedings before courts or regulatory agencies, if opposed, entail expense in terms of time and money for both sides. But, this is inherent—so much so that, as plaintiffs say in their own brief, "Individually, the members of the Dwyer group" (defendants) "would not take the action against plaintiffs which their conspiracy has allowed them to take" (Plt. Brief of 5/16/67, p. 6, line 6) and in their Amended Complaint they make the significant statement that decisions of the agency "but for defendants' combination and conspiracy, would not have been rendered *adverse* to plaintiffs and other competitors of defendants, *because no opposition would otherwise have been commenced.*" (Amended Complaint, par. 8(4)10, p. 12). (emphasis added).

The Patent Cases

Plaintiffs mainly rely upon cases involving the claim that combinations involving the threat or actual commencement of patent infringement suits were violations of the antitrust laws.

In *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963) the United States sued to restrain Singer, the sole American manufacturer of certain sewing machines, from conspiring with two of its competitors, an Italian manufacturer (Vigorelli) and a Swiss manufacturer (Gegauf) to restrain interstate and foreign trade in sewing machines, specifically certain Japanese competition.

The District Court ruled for defendants on the ground that there did not appear to be a concert between Singer and its alleged co-conspirators to restrain the Japanese competition and that Singer was merely acting within its right to protect its own patent. The Supreme Court reversed, holding that, according to its interpretation of the trial court's findings, a conspiracy to exclude Japanese competition in violation of the Sherman Act was shown.

The findings were to the effect that defendants had combined (1) to withdraw opposition to each other's applications in the Patent Office in order to secure broad claims regardless of validity; (2) to cross-license and assign their respective patents on a world-wide royalty free basis, and (3) assignment of an American patent (owned by the Swiss manufacturer [Gegauf] in order that this patent could be more effectivel enforced by Singer in the United States against the Japanese competition through infringement suits and certain Tariff Commission proceedings.

The Court said:

> "Thus, by entwining itself with Gegauf and Vigorelli in such a program Singer went far beyond its claimed purpose of protecting its own 401 machine—it was protecting Gegauf and Vigorelli, the sole licensees of the patent at the time, under the same umbrella. This the Sherman Act will not permit. * * * The fact that the enforcement plan likewise served Singer is of no consequence, the controlling factor being the overall common design, i.e., to destroy the Japanese sale of sewing machines in the United States by placing the patent in Singer's hands the better to achieve this result. It is this concerted action to restrain trade that condemns the transaction under the Sherman Act. * * * It is well settled that 'beyond the limited monopoly which is granted, the arrangements under which the patent is utilized are subject to general law. * * * By aggregating patents in one control the holder of the patents cannot escape the prohibitions of the Sherman Act. That Act imposes strict limitations on the concerted activities in which patent owners may lawfully engage."

In *Kobe v. Dempsey Pump Co.*, 198 F.2d 416 (10th Cir. 1952), an action for patent infringement, defendants counter-claimed alleging that plaintiff's misuse of its patent monopoly, including, among other things, the bringing of an infringement suit, violated Sections 1 and 2 of the Sherman Act.

Affirming a judgment for defendants on their antitrust counterclaim, the Court, dealing with plaintiff's contention that its monopolistic practices did not reach the defendants until the commencement of the infringement suit and that to allow recovery of damages would be a denial of

free access to the courts, recognized that although free and unrestricted access to the courts should not be denied or imperiled in any manner, the courts should not be made a vehicle for maintaining and carrying out an unlawful monopoly having for its purpose the elimination and prevention of competition, adding, however, on p. 425:

> "We have no doubt that, *if there was nothing more than the bringing of the infringement action* (emphasis added) resulting damages could not be recovered, but that is not the case. The facts as hereinbefore detailed are sufficient to support a finding that, although Kobe (plaintiff) believed some of its patents were infringed, the real purpose of the infringement action . . . was to *further the existing monopoly* (emphasis added) and to eliminate Dempsey as a competitor. The infringement action and the related activities, of course, in themselves were not unlawful, and *standing alone would not be sufficient to sustain a claim for damages* (emphasis added) which they may have caused, but *when considered with the entire monopolistic scheme which preceded them,* (emphasis added) we think, as the trial court did, that they may be considered as having been done to give effect to the unlawful scheme. . . ." distinguishing *Virtue v. Creamery Package Co.,* 227 U.S. 8 (1913) and *International Visable Systems v. Remington Rand,* 65 F.2d 540 (6th Cir. 1933) as involving "single and isolated actions not preceded by a long history of unlawful monopolization," 198 F.2d 416, at 425.

In *Lynch v. Magnavox,* 94 F.2d 883, 888-890 (9th Cir. 1938), the Court reversed a dismissal on demurrer of an antitrust complaint which alleged that defendants, who had cross-licensed their respective patents, had combined

to restrain competition and to monopolize the radio speaker business by threatening rádio manufacturers with a ruinous commercial campaign of letter writing and by threatening and commencing in bad faith groundless actions against the manufacturers and their customers for infringement of their allegedly invalid patents in order to force the manufacturers to discontinue purchase of radio speakers from anyone but defendants.

The Court held that, assuming each of the alleged acts to be lawful in themselves, the combination would be a violation of the antitrust laws if its purpose was to restrain competition or to attempt monopoly, saying: "In other words, if the purpose of the plan is to effect a monopoly or to fix prices . . . then the act is violated by use of any means to that end, *including a cross-licensing agreement.*" (emphasis added).

The theory of these cases, as set forth in *Mercoid v. Mid-Continent,* 320 U.S. 661, 665-666 (1943), is that a patentee has been given a privilege of limited monopoly conditioned, however, by a public purpose; that, although he may enforce his patent rights (either directly obtained or acquired from others under assignment or license), he may not use his limited monopoly in such manner as enables him to acquire a broader monopoly than is within the strictly confined and precise terms of his patent grant; that the method by which his monopoly is sought to be extended is immaterial and that, when the patent is thus diverted from its statutory purpose, the antitrust laws apply.

Further, in these cases the combinations involved other acts of the conspirators, e.g., illegal cross-licensing

schemes and similar activities, of which the infringement suits, or threats thereof were merely the effectuating means.

In none of these patent cases did the court hold or say that mere association for the bringing or threatening of a patent infringement suit—*without more*—is, itself, an antitrust violation merely because the associates may contemplate injury to a competitor.

On the other hand, it was early recognized in *International Visable Systems v. Remington-Rand,* 65 F.2d 540 (6th Cir. 1933) at 542, that the mere bringing of a patent infringement suit, even if alleged to have been brought maliciously and with the purpose of monopolizing an industry, does not state a violation of Section 2 of the Sherman Act (attempt to monopolize, i.e., regardless of concert of action) the Court saying:

> "The suit brought by appellee for the infringement of its patents cannot of itself be characterized as an attempt to monopolize trade or commerce. It was nothing more than a lawful method of protecting appellee's claimed monopoly under the patent laws * * * Moreover, the declaration in the petition that the suits for infringement were brought against appellant 'maliciously and without probable cause' adds nothing to the weight of the claim that the infringement suit was an attempt to monopolize trade or commerce", citing *Virtue v. Package Creamery,* 227 U.S. 8, 38 (1912).

In any event, the defendants in this pending case have not combined to bring patent infringement suits nor are they grantees of any monopoly which could possibly have been misused. They are simply certificated business enti-

ties in an industry which is competitive within a framework of regulation according to standards of public convenience and necessity.

It is, therefore, unnecessary to decide whether the patent cases indicate a special area to which the immunization doctrine of *Noerr* does not extend.

We only hold that the narrowly framed allegations of this Amended Complaint are such that the activities for which defendants have associated are and must be held immune from the antitrust laws—even though their ultimate purpose may be to reduce, injure or destroy competition.

The pleading has already been once amended and, presumably, plaintiffs have gone as far as they can truthfully go toward alleging an antitrust violation. The First Amended Complaint will, therefore, be dismissed without leave to amend subject to the condition that, if plaintiffs move for leave to amend within fifteen (15) days from the date of this order, the Court will consider whether their amended pleading is sufficient to state a claim upon which relief could be granted.

Dated: October 5th, 1967.

W. T. Sweigert,
United States District Judge

Original Filed October 6, 1967
Clerk, U.S. Dist Court, San Francisco.

United States District Court
Northern District of California

Post Office Building
San Francisco 1, California

Chambers of
William T. Sweigert
United States District Judge

October 25, 1967

Mr. Michael N. Khourie
Attorney at Law
Russ Building
235 Montgomery Street
San Francisco, California

Re: Trucking Unlimited, et al. v. California Motor Transport Co., et al., No. 45073

Dear Mr. Khourie:

On October 5, 1967, this Court issued its Memorandum of Decision in Civil No. 45073, dismissing the first amended complaint on the ground that, under the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the first amended complaint failed to "state a claim upon which relief can be granted" pursuant to Fed. R. Civ. P. 12(b)(6).

Although that Memorandum deals exclusively with the applicability of the *Noerr* doctrine, it appears that there is some uncertainty with respect to whether the Court passed upon defendants' second motion to "Dismiss First Amended Complaint on Ground of Primary Jurisdiction, or to Stay Pending Administrative Action."

On page 2 of defendants' Memorandum of Points and Authorities in support of their motions, filed April 17, 1967, the defendants requested:

> "That the Motion to Dismiss for Failure to State a Cause of Action be considered First and Separately from the motions based on primary jurisdiction, and that the argument on the latter be withheld until decision on the former, so that if the Court agrees with defendants' position argument on the second motion will become unnecessary."

The Court also notes that defendants' motion to dismiss under the *Noerr* doctrine was the only motion argued during the oral presentation of this matter.

Lest there be any misunderstanding, I think it obvious that the separately made motion to dismiss on ground of primary jurisdiction *or* to stay pending administrative review was *not* considered in the October 6, 1967 Memorandum of Decision.

Sincerely,
W. T. Sweigert

cc:
Graham James & Rolph
Heller, Ehrman, White & McAuliffe
John MacDonald Smith, Esq.
W. D. Benson, Jr., Esq.

United States Court of Appeals
For The Ninth Circuit

No. 22,462

Trucking Unlimited, et al.,
Plaintiffs-Appellants,
vs.
California Motor Transport Co., et al.,
Defendants-Appellees.

[October 5, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: Hamlin and Browning, Circuit Judges,
and Pregerson,* District Judge.

Browning, Circuit Judge:

This is an action by one group of trucking companies against another seeking treble damages and injunctive relief under the Sherman and Clayton Acts, 15 U.S.C. §§ 1-27. All are common carriers regulated by the California Public Utilities Commission (PUC) and the Interstate Commerce Commission (ICC) and require licenses from these agencies to operate.

The complaint alleges a conspiracy among defendants to restrain and monopolize the highway common carriage business in California and elsewhere by a jointly financed,

*Honorable Harry Pregerson, United States District Judge, Central District of California, sitting by designation.

widely publicized program of opposing, before the two commissions and the courts, all applications by actual or potential competitors for the issuance, transfer, or registration of operating rights. The district court dismissed the action on the ground that the complaint failed to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6).[1] For the purposes of this appeal, we must accept all the allegations of the complaint as true, 2A Moore, Federal Practice ¶ 12.08, at 2266-67; and we can affirm only if "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). *See Harman v. Valley National Bank,* 339 F.2d 564, 565 (9th Cir. 1964); *Corsican Productions v. Pitchess,* 338 F.2d 441, 442 (9th Cir. 1964).

The district court held that relief was barred by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), and *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), which hold that the Sherman Act does not forbid attempts to influence the passage or enforcement of laws. We disagree for two reasons. First, concerted employment of judicial and administrative adjudicative processes as part of a scheme to restrain trade, as alleged in this complaint, is not excluded from the Sherman Act by the *Noerr-Pennington* doctrine. Second, even if the *Noerr-Pennington* rule does apply to the use of judicial and administrative adjudicative processes in a scheme to restrain trade, relief is not barred if, as alleged in this complaint,

[1]The district court's opinion is reported at 1967 Trade Cas. ¶ 72,298 (N.D. Cal. 1967).

the real purpose of defendants' joint activity was to restrain competitors directly, rather than to restrain them indirectly by inducing restrictive governmental action.

I

The *Noerr-Pennington* principle is a judicially implied exception to the general rule that an unlawful purpose may bring otherwise lawful means within the proscription of the Sherman Act. *See American Tobacco Co. v. United States,* 328 U.S. 781, 809 (1946). The exception's premise is that the responsibility for enacting or not enacting laws concerning trade restraints rests with the legislative branch of government; and, similarly, responsibility for enforcing or not enforcing those laws rests with the executive branch. *Noerr, supra,* 365 U.S. at 135-136. Hence, valid legislative or executive action that results in the restraint or monopolization of trade does not violate the Sherman Act. *United States v. Rock Royal Co-operative, Inc.,* 307 U.S. 533, 560 (1939).[2]

Attempts to influence the legislative and executive branches are also excluded from the Sherman Act because prohibiting such activity "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends

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[2]The Supreme Court has also held that the Sherman Act does not apply to valid *state* legislative or executive action since "the Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." Parker v. Brown, 317 U.S. 341, 351 (1943).

upon the ability of the people to make their wishes known to their representatives." *Noerr, supra,* 365 U.S. at 137.[3]

And the Sherman Act does not apply to efforts to influence the enactment or enforcement of laws even when those efforts are motivated by an anticompetitive purpose because "it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." *Id.* at 139.

This is a powerful argument for holding that joint efforts to influence legislative and executive action are excluded from Sherman Act liability regardless of purpose, but it does not justify immunizing agreements to utilize judicial and administrative adjudicative processes in a scheme to restrain trade. The fundamental reason for the *Noerr-Pennington* exception does not apply. It is not the function of the courts to determine whether laws restraining trade will be adopted or, having been adopted, whether they will be enforced; nor is this the function of an ad-

[3]Such efforts are the "political activity" referred to in *Noerr.* The Court proffered two additional reasons for its holding: (1) the "essential dissimilarity" between agreements traditionally condemned by the Sherman Act—price fixing, boycotts and market divisions—and agreements to solicit the passage or enforcement of laws; and (2) the important constitutional questions concerning the right to petition the government that would be raised if the Act were construed to prohibit joint solicitation of government action.

ministrative agency engaged in adjudication, as the PUC and ICC are here.[4] It would be pointless to limit the reach of the Sherman Act in order to protect the access of courts and agencies engaged in adjudicative functions to information and opinion relevant to determinations which they have no power to make.[5]

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[4]Licensing proceedings are adjudicative rather than legislative in nature. 5 U.S.C. § 551 (6)-(9). The PUC, for example, applies a standard of "public convenience and necessity," Cal. Pub. Util. Code § 1064, to the facts in each case—experience, financial ability, available equipment. *See, e.g.*, Encinal Terminals, 61 Cal. P.U.C. 807, 809-10 (1950). Davis characterizes as adjudicative "facts about the parties and their activities, businesses, and properties," 1 K. Davis, Administrative Law Treatise § 7.02, at 413 (1958), and Judge Friendly has described as judicial "the application of standards of greater or less generality to concrete cases." Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 75 Harv. L. Rev. 863, 874 (1962). Plaintiffs expressly excluded any PUC or ICC rule-making proceedings from the complaint.

Furthermore, beyond their efforts to influence administrative adjudicative processes, defendants allegedly pursued appeals in the courts from every adverse administrative determination. Even if the agency determinations were quasi-legislative, and thus within the *Noerr-Pennington* exception, court proceedings to review those determinations would be subject to the general strictures of the antitrust laws. *But see* Woods Exploration & Prod. Co. v. ALCOA, 284 F.Supp. 582, 594-595 (S.D. Tex. 1968).

[5]The holding in *Pennington* that it was error to instruct the jury in that case that joint "approaches" to Tennessee Valley Authority officials and to the Secretary of Labor might be illegal if accompanied by an anticompetitive purpose is not inconsistent with our conclusion that efforts to influence administrative adjudicative proceedings are not within the *Noerr-Pennington* exemption.

There is nothing to indicate that the administrative action sought to be influenced was adjudicatory; the language of the *Pennington* opinion suggests that it was not. Clearly, the decision of TVA officials to purchase their coal requirements on the open market was not adjudicatory in character. The nature of the "approach" to the Secretary of Labor is unclear. The Secretary has a good deal of discretion in determining whether to initiate proceedings under the Walsh-Healey Act to set a minimum wage in a given industry. 41 C.F.R. § 50-203.15; *see* Modley, Patton & Reilly, Problem Child Among Labor Laws—The Walsh-Healey

Accordingly, the general rule is applicable—the Sherman Act is violated by a conspiracy to unreasonably restrain or monopolize trade through the use of judicial and administrative adjudicative proceedings. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 424-425 (10th Cir. 1952); *Lynch v. Magnavox Co.*, 94 F.2d 883 (9th Cir. 1938); *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F.Supp. 199, 213-14 (D. N.J. 1951), *appeal dismissed*, 204 F.2d 230 (3d Cir. 1953).[6] *See also* Note, The Brakes Fail on the Noerr

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Act, 1963 Duke L. J. 205, 210, 221; 48 Dep't of Labor Ann. Rep. 250 (1960). If the "approaches" were to influence his exercise of that policy-making function under the Act, they were protected under *Noerr*. *See* Harman v. Valley Nat'l Bank, 339 F.2d 564, 566 (9th Cir. 1964). Moreover, even if we assume that defendants sought to influence the wage determination itself, the proceeding by which that determination is made, though including a hearing, 41 U.S.C. § 43a(b), is nonetheless rule-making and quasi-legislative in nature, *see* 5 U.S.C. § 551(4) & (5); Wirtz v. Baldor Elec. Co., 119 U.S. App. D.C. 122, 337 F.2d 518, 534 (1963), rather than adjudicative.

[6]At the very least, these decisions demonstrate that agreements to use litigation as a means to restrain trade are not "essentially dissimilar," in the *Noerr* sense, from those traditionally condemned under the Sherman Act.

They also support the proposition that, on balance, the public interest in free competition served by the condemnation of agreements to use judicial and administrative adjudicative processes for the purpose of restraining trade outweighs the resulting restraint upon first amendment rights. *See* Note, The Brakes Fail on the Noerr Doctrine, 57 Calif. L. Rev. 518, 537-40 (1969). As the court observed in Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416, 424 (10th Cir. 1952):

> "It is said that to allow recovery of damages resulting from the infringement action would be a denial of free and unrestricted access to the courts. We fully recognize that free and unrestricted access to the courts should not be denied or imperiled in any manner. At the same time we must not permit the courts to be a vehicle for maintaining and carrying out an unlawful monopoly which has for its purpose the elimination and prevention of competition."

Doctrine, 57 Calif. L. Rev. 518 (1969). *But see Bracken's Shopping Center, Inc. v. Rowe,* 273 F.Supp. 606 (S.D. Ill. 1967).[7]

See also Report of the Attorney General's National Committee to Study the Antitrust Laws 248 (1955).

The overwhelming public interest in uninhibited communication between the people and their legislators and law enforcement officials that justifies immunizing joint efforts to influence those authorities from antitrust liability despite either wrongful purpose or the use of distortion and deception, does not apply to presentations to judges and administrative officials in the course of adjudicative proceedings. Unlike legislators and law enforcement officials, judicial and administrative adjudicators do not act in a representative capacity. There is a marked difference between the processes by which they arrive at decisions, the materials upon which they may properly rely, and the atmosphere consistent with effective performance of their respective functions. Sheppard v. Maxwell, 384 U.S. 333, 350-351 (1966); Bridges v. California, 314 U.S. 252, 271 (1941); Costilo, Antitrust's Newest Quagmire: The Noerr-Pennington Defense, 66 Mich. L. Rev. 333, 349 (1967); Note, The Brakes Fail on the Noerr Doctrine, 57 Calif. L. Rev. 518, 532-33 (1969); *cf.* Note, Application of the Sherman Act to Attempts to Influence Government Action, 81 Harv. L. Rev. 847, 849 (1968).

It is significant that in *NAACP v. Button,* 371 U.S. 415 (1963), a decision heavily relied upon by defendants, the Supreme Court discussed with approval cases that rely upon the actor's purpose in distinguishing the lawful and ethical from the unlawful and unethical in the area of stimulating litigation, *see* 371 U.S. at 439-441, and repeatedly noted that the NAACP acted with a lawful purpose in urging utilization of the courts. *Id.* at 429-430, 439-441. *See also* Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

[7]Other decisions are distinguishable. E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir. 1966), involved governmental rather than private action. In Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954), and Woods Exploration & Prod. Co. v. ALCOA, 284 F.Supp. 582 (S.D. Tex. 1968), the only injury alleged resulted from valid governmental action. Both of those cases as well as Association of Western Rys. v. Riss & Co., 112 U.S. App. D.C. 49, 299 F.2d 133 (1962), Schenley Indus. Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n, 272 F.Supp. 872 (D. N.J. 1967), and A.B.T. Sightseeing Tours Inc. v. Gray Line N.Y. Tours, 242 F.Supp. 365 (S.D.N.Y. 1965), appear to have involved administrative rule-making rather than adjudication. Citizens' Wholesale Supply Co. v. Snyder, 201 F. 907 (3d Cir. 1913), involved efforts to

The district court considered *Singer* and the other patent cases inapposite because they involved patent litigation[8] and because litigation was only one of several means employed in the scheme to restrain trade. The court did not explain the significance of either factor, and we do not see any.

Because the legal monopoly conferred by a patent lends itself to misuse as a means to illegally monopolize and restrain trade, it is often a significant factor in determining whether a particular course of conduct violates the Sherman Act that a patent is involved. This fact, however, has no bearing at all upon whether the *Noerr-Pennington* defense applies. That doctrine is concerned with protecting joint efforts to influence governmental action as such—the subject matter of the governmental action is beside the point. The significance of the cases cited is not that they involve the use of patent litigation to restrain trade, but that they involve the use of litigation for that purpose. They demonstrate that litigation can be an integral part of a scheme prohibited by the Sherman Act.

Pennington disposes of the second basis for distinction relied upon by the district court. If the *Noerr-Pennington* defense had applied to the use of litigation for the purpose of restraining trade, the defense would have been available whether this means was employed as part of a larger scheme or stood alone. *Pennington, supra,* 381 U.S.

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influence a local prosecutor's enforcement of an ordinance, *see* Harman v. Valley Nat'l Bank, 339 F.2d 564 (9th Cir. 1964), and there was no allegation of anticompetitive purpose.

[8]Slick Airways, *supra,* cited with approval by the Supreme Court in Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690, 707 (1962), did not involve patent litigation.

at 670. Furthermore, litigation and threats of litigation were the only means used to exclude competitors in *Walker Process*.

We conclude, therefore, that the *Noerr-Pennington* defense does not bar relief when a conspiracy to employ judicial and adjudicative processes in a scheme to restrain trade is alleged.

II

Dismissal was improper for another reason. Plaintiffs have alleged that defendants' real purpose was to restrain trade directly, rather than indirectly through the medium of governmental action. If this is true, plaintiffs may prevail under the "sham" exception to the *Noerr-Pennington* rule regardless of the status of joint approaches to adjudicative bodies under that defense.

The plaintiffs in *Noerr* contended, and the trial court found, that the defendants sought to injure plaintiffs directly by destroying their good will with the public and with their customers, thus weakening their competitive position and causing them to lose business. The Supreme Court noted that "the apparent effect of these findings is to take this case out of the category of those that involve restraints through governmental action and thus render inapplicable" the principle that efforts to induce such governmental action do not violate the Sherman Act. 365 U.S. at 142. The Supreme Court held, however, that plaintiffs' attempt to exclude their case from the latter category failed for want of evidence.

The Court pointed out that there was no finding that the defendants attempted directly to persuade anyone

not to deal with the plaintiffs. On the contrary, the evidence reflected only efforts by the defendants to influence the passage and enforcement of laws. The Supreme Court concluded, therefore, that "the findings of the District Court that the [defendants'] campaign was intended to and did in fact injure the [plaintiffs] in their relationships with the public and with their customers can mean no more than that the [plaintiffs] sustained some direct injury as an incidental effect of the [defendants'] campaign to influence governmental action and that the [defendants] were hopeful that this might happen." *Id.* at 143.

This was not enough to render defendants' publicity campaign actionable. The Court noted that whenever an attempt is made to influence legislation by such a campaign it is inevitable that some incidental injury will be visited upon the opponents, and equally inevitable that those conducting the campaign will be aware of this possibility.

On the other hand:

> "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denies that the [defendants] were making a genuine effort to influence legislation and law enforcement practices. Indeed, if the version of the facts set forth in the [plaintiffs'] complaint is fully credited, as it was by the courts below, that effort

> was not only genuine but also highly successful. Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case." *Id.* at 144.

The "sham" exception is derived from the basic rationale of the *Noerr-Pennington* defense: The Act does not bar legislation or law enforcement restraining trade and therefore does not bar the solicitation of such action. Conversely, if joint action is not for the purpose of restraining competition by inducing governmental action, but is rather for the purpose of imposing a direct restraint by the defendants' own conduct, the Sherman Act applies. *Cf. Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-707 (1962).

Plaintiffs assert that their proof[9] would establish such a conspiracy to impose a direct restraint under the guise of a program to induce governmental action. Briefly, they make the following allegations.

It was and is the policy of the PUC to encourage competition in the trucking industry by freely granting, and approving the transfer of, certificates of public convenience and necessity. Until 1963 it was the policy of the ICC to register any certificate issued by the PUC automatically, without further hearing.

In 1961 defendant trucking companies, the largest highway common carriers in California and the western states, undertook to lessen competition from smaller companies

[9]Some of the details recited appear in plaintiffs' briefs and are not specifically set out in the complaint. The allegations of the complaint are clearly sufficient to allow their proof.

resulting from the relatively easy access to operating rights. They decided to accomplish this objective, not by seeking to induce the PUC to change its policy, but rather by discouraging the filing of applications with the PUC and the ICC. To that end they agreed to take, and took the following steps.

They agreed to and did establish and maintain a joint trust fund by monthly contributions based upon each defendant's gross income. They informed their competitors that they would use this trust fund to finance opposition to all applications then pending or thereafter filed by their competitors with the PUC or the ICC; that each and every application would be opposed with or without probable cause, and regardless of its merits; and that in every case defendants would pursue their opposition through all stages of administrative and judicial review. Defendants told their competitors that they could avoid the expense and delay resulting from defendants' opposition only by abandoning pending applications and severely limiting or refraining entirely from filing further applications.

As a direct result of defendants' joint activities, the financial resources of plaintiffs and other competitors of the defendants were depleted; applications by plaintiffs and other competitors for the issuance, transfer, or registration of operating rights were defeated, delayed, or restricted; and plaintiffs and other competitors were deterred from instituting or pursuing such applications. Defendants' joint activities effectively foreclosed plaintiffs and other competitors from access to the PUC, the ICC, and to the courts in review proceedings; it denied

those agencies and the courts the benefit of facts and information required for the making of competent decisions; and it severely curtailed competition.

The rationale underlying the *Noerr-Pennington* defense does not dictate immunity for this alleged conspiracy. The purpose of defendants' joint activity was not to induce action by the affected governmental agencies, but to preclude it. That is hardly a "genuine" effort to influence governmental action in the *Noerr* sense. Prohibiting such joint activity under the Sherman Act would not "impair the power of government to take actions . . . that operate to restrain trade." *Noerr, supra,* 365 U.S. at 137. It would not impede "the ability of the people to make their wishes known to their representatives" in any legitimate sense, *id.;* nor "deprive the government of a valuable source of information." *Id.* at 139.

Nonetheless, the district court held the "sham" exception inapplicable because plaintiffs did not allege that the presentations which defendants made to the agencies and the courts were in themselves false, misleading, or lacking in evidentiary or legal support. But the question is whether the defendants sought to restrain competition by inducing restrictive governmental action, on the one hand; or, on the other, sought to restrain competition by the deterrent effect of their own joint activity.

That their joint activity took the form, in part, of solicitation of governmental action and that they made a genuine effort to support all protests as effectively as possible would not negate a primary purpose to restrain competition directly. The means allegedly adopted by defendants to deter agency action was to discourage the

filing of requests for such action by a jointly financed, well publicized program of opposing every application filed. Since all applications were to be opposed, it is irrelevant that a valid basis existed for opposing some applications. Nor is it relevant that the opposition was as effective as defendants could make it; mere token opposition would not have the requisite deterrent effect.

The purpose of this alleged conspiracy was to inflict injury upon competition directly by defendants' own joint activity. Inevitably, given the nature of the means employed, defendants' activity would also injure competitors indirectly by influencing rulings of the agencies and the courts. Here, however, that indirect injury is merely incidental; and its occurrence cannot justify application of the *Noerr-Pennington* defense. As a practical matter, to hold otherwise would make the "sham" exception inapplicable to any conspiracy to restrain trade cloaked with the mantle of a campaign to influence governmental action. *Cf. Noerr, supra,* 365 U.S. at 143-144.

Reversed and remanded for further proceedings.

HAMLIN, Circuit Judge, dissenting:

I respectfully dissent.

Section 1063 of the California Public Utilities Code provides that no highway common carrier may operate without a certificate from the Public Utilities Commission "declaring that the public convenience and necessity require such operation." In order to exercise its judgment implementing the broad statutory standard of "public convenience and necessity" in an individual case, the Public Utilities Commission is largely dependent upon information provided by the applicant and competing carriers. See *Peninsula Motor Express*, 49 Cal. P.U.C. 807 (1950). The activities of defendants in supplying this information to the Commission is thus lawful.

In my view, the activities of the Public Utilities Commission in the implementation of the broad statutory standard is one akin to policy making. The participation of the defendants in this policy making process, through their opposition to the grant of certificates or transfers of certificates is in my opinion protected from Sherman Act liability by the decisions of the United States Supreme Court in *Noerr* and *Pennington*, despite the assumption, arising from the posture of this case, that defendants have an anti-competitive motive. The Public Utilities Commission has the power and ability to correct any abuses flowing from the activities of defendants through their opposition to the grant or transfer of certificates, see California Public Utilities Code §§1062, 1064, and I think that the plaintiffs must look to the Commission, rather than to the Sherman Act, for their remedy. See *George R. Whitten, Jr., Inc. v. Paddock Pool*

Builders, Inc., 424 F.2d 25, 30 (1st Cir. 1970). See generally, Note, Application of the Sherman Act to Attempts to Influence Government Action, 81 Harv. L. Rev. 847 (1968).

For these reasons, and for the reasons stated by Judge Sweigert in his United States District Court decision, reported in 1967 Trade Cases ¶ 72,298 (N.D.Cal. 1967), I would affirm.

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U.S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

October 5, 1970

Re: No. 22462, Trucking Unlimited, et al. v.
California Motor Transport Co., et al.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered reversing and remanding the judgment or order of the court below (or administrative agency). You have 14 days from this date to file a petition for rehearing if you wish to do so.

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,
Wm. B. Luck,
Clerk of Court

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1970

Trucking Unlimited, et al., Petitioners,

vs.

California Motor Transport Co., et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s).

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 18, 1971.

Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 22nd day of December, 1970.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1970

California Motor Transport Co., et al., Petitioners,

vs.

Trucking Unlimited, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s).

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including March 4, 1971.

W. O. Douglas
Associate Justice of the Supreme
Court of the United States

Dated this 9th day of February, 1971.

SUPR[illegible]

[illegible] 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted] 70-92

CALIFORNIA MOTOR TRANSPORT CO., et al., *Petitioners,*

vs.

TRUCKING UNLIMITED, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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